Office-Supreme Court, U.S.
FILED
DEC 6 1966
JOHN F. DAVIS, CLERK

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1966

No. 605

SKOURAS THEATRES CORPORATION, THEATRE & CINEMA, INC., PHILHAMBRO, INC., YOUNGSTOWN THEATRE CORPORATION AND MODERN PLAYHOUSES, INC.,

Petitioners,

v.

NICK C. SPANOS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

MILTON C. WEISMAN,
HARRY I. RAND,
Attorneys for Petitioners.

INDEX

Cases Cited

	PAGE
Alabama v. Arizona, 291 U. S. 286 (1934)	8
Kelly v. Kosuga, 358 U. S. 516 (1959)	7
Massachusetts v. United States, 333 U. S. 611 (1948)	9
Matter of New York County Lawyers Association (Bercu), 273 App. Div. 524, 78 N. Y. S. 2d 209 (1st Dept. 1948), aff'd 299 N. Y. 728 (1949)	3n
Muskrat v. United States, 219 U. S. 346 (1911)	8
Sperry v. Florida, 372 U. S. 379 (1963)	6
Spivak v. Sachs, 16 N. Y. 2d 163, 263 N. Y. S. 2d 953	2, 3, 7
United States v. Title Ins. Co., 265 U. S. 472 (1924)	9
Woods v. Interstate Realty Co., 337 U. S. 535 (1949)	9

Other Authorities Cited

District Court Rule 3(c)	2, 3n, 5
United States Constitution: Fourteenth Amendment	1, 7

IN THE

Supreme Court of the United States

October Term, 1966

No. 605

SKOURAS THEATRES CORPORATION, THEATRE & CINEMA, INC., PHILHAMBRO, INC., YOUNGSTOWN THEATRE CORPORATION AND MODERN PLAYHOUSES, INC.,

Petitioners,

v.

NICK C. SPANOS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

In his opposition to the petition for certiorari, the respondent, Spanos, simply ignores the two principal questions raised by the decision below—whether and to what extent federal law preempts regulation by New York as to the practice of law within that state and whether and to what extent the privilege and immunities clause of the Fourteenth Amendment restrains such regulation. These questions however, cannot be dismissed so lightly. They are exceedingly important and bear directly on the delicate balance between the powers of the states and the federal government in an area traditionally reserved to state regulation; and the manner in which the Court below has decided them is so plainly in error that review by this Court is urgently required.

1. Spanos insists that the decision below presents only the one narrow question: how shall the local General Rule 3(c) of the District Court for the Southern District of New York, providing for *pro hac vice* admission to that Court, be applied to the facts of this particular case? What he obscures, however, is that when the Court below, as it does here, so construes Rule 3(c) as to legitimize Spanos' practice of law in New York without regard to the law of that state, it implicitly holds that that local rule preempts the field and bars the application of the New York law to Spanos' activities, insulating him from all state regulation as to the unauthorized practice of law. The decision below therefore necessarily involves the question whether there has been such a federal preemption of this field and, if so, to what extent. We contend that on this issue the decision below is in error.

We do not, as Spanos unjustifiably suggests (Memo. Opp. 13), seek certiorari to obtain a ruling by this Court as to whether he violated the laws of New York. We consider that issue foreclosed, against Spanos, by the recent decision of the New York Court of Appeals in *Spivak* v. *Sachs,* 16 N. Y. 2d 163, 263 N. Y. S. 2d 953, which makes it plain that under New York law, Spanos would be denied the recovery granted to him by the Court below. As the Second Circuit panel noted, "[t]he broad sweep of New York decisions culminating in *Spivak* makes it clear that virtually no legal services may be rendered in New York by a person not admitted to the state bar except for 'customary and innocuous practices' in transactions only 'somehow' tied to New York. *Spivak* v. *Sachs, supra,* 16 N. Y. 2d at 168, 263 N. Y. S. 2d at 956" (Pet App. 15a). The *in banc* Court did not express a contrary view; concluding that the privileges and immunities clause of the Constitution precludes application of such state law to the activities of out-of-state lawyers when they collaborate with in-state

lawyers concerning federal claims or defenses, it found it unnecessary to consider whether Spanos' conduct was condemned by New York law [1] (Pet. App. 26a).

We must bear in mind that we do not here have the case of that "out-of-state attorney", hypothesized by Spanos, "who does no more than advise or do research on . . . [a] federal claim" in association with in-state lawyers (Memo. Opp. 10-11). As the Second Circuit panel remarked, ". . . Spanos was not merely consulting with his clients' local lawyers, a practice which indeed is common" (Pet. App. 15a). Rather, as the District Court found, "he worked directly with the Skouras companies [petitioners] and independently of Landis [the in-state attorney with whom he was supposedly associated]. Certainly he was not under any supervision of Landis and their association was in name only. Spanos put it in a letter in July 1953 that his hiring was to be 'full and equal' with Weisman, Sherpick and Landis [the in-state attorneys] . . . . [T]he 'association' between Landis and Spanos was only on paper; and from the beginning Spanos had been dealing directly with George [Skouras] and the Skouras companies." 235 F. Supp. at 7, 8.

---

[1] Contrary to Spanos' suggestion (Memo. Opp. 13, n. 6), there are no significant distinctions between the *Spivak* case and the case here. Notwithstanding the lower state court ruling to which Spanos adverts, the New York Court of Appeals has made it clear that the practice of law prohibited by New York law includes legal services relating to federal matters. *Matter of New York County Lawyers Association* (*Bercu*), 273 App. Div. 524, 78 N. Y. S. 2d 209 (1st Dept. 1948), aff'd 299 N. Y. 728 (1949).

We certainly did not intend to be half-hearted in our argument as to Spanos' failure to obtain admission to the New York bar (see Memo. Opp. 4, n.2). In our view, that failure is fatal to his claim in this case, and, in light of his five-year practice of law in the state, *pro hac vice* admission to the District Court would not have aided him. Beyond this, as we note, he failed to seek or obtain such *pro hac vice* admission and therefore should not in any event be permitted to rely on Rule 3(c).

Moreover, Spanos' legal practice in New York was not restricted to the matters involved in the federal antitrust action, the so-called "industry suit". He also "rendered legal services in a number of matters for the Skouras companies or affiliates which were unconnected with the industry suit and for which he expected compensation . . . directly to the . . . clients", and independently of any other lawyers. 235 F. Supp. at 9.[2]

All this occurred neither during a short period of time nor only on occasional visits into New York, but rather over a period of five years, while Spanos occupied offices in New York, resided there with his family and frequently met and conferred with his clients there.

In such circumstances, as the Second Circuit panel stated, the "New York courts would refuse to grant recovery to Spanos if it were within their power to do so" (Pet. App. 16a). But the decision below holds that local Rule 3(c) of the District Court deprives them of that power and insulates Spanos from state regulation. In effect, then, the Court below holds that state laws prohibiting the unauthorized practice of law are displaced by federal law and rule, at least with respect to services rendered by out-of-state attorneys incident to federal litigation, notwithstanding the fact that such attorneys engage for many years in the state in the practice of law in violation of state laws.

It is doubtful that Congress has the power so to supplant state regulation of the practice of law, an area long considered reserved to the states. In any event, Congress has thus far manifested no intention to do so, with that clarity necessary to spell preemption. The construction which

---

[2] In the light of these findings of the trial court (which Spanos has never disputed), we do not understand how he can now represent to this Court that he "gave no advice concerning New York law" and that the legal services for which he seeks recovery in this case "were at all times in aid of and in association with" petitioners' New York lawyers (Memo. Opp. 6, 8).

the Court below accords Rule 3(c) is therefore wholly unauthorized and invades a field of state concern in violation of the Constitution.

We have, it is true, argued further that local Rule 3(c) is in any event inapplicable because Spanos failed to invoke it. But Spanos misconceives our position when he says that we have "consistently recognized" that compliance with the rule is "enough to insulate a lawyer against any possible unauthorized practice charge" (Memo. Opp. 13). To the contrary, we have always contended that 28 U. S. C. 1654, the statute pursuant to which the rule was presumably promulgated, affords no authority for so radical a displacement of state regulation (Pet. 13) and that there is no suggestion elsewhere that Rule 3(c) was intended to effect such a displacement (Pet. 15-17).

Nor is there any support for the contention, repeatedly asserted by Spanos, that his failure to secure *pro hac vice* admission to the District Court was petitioners' fault, not his; that petitioners had an obligation to call the New York law to his attention and arrange his admission and failed to do so (Memo. Opp. 4-6). The record discloses that, in fact, one of petitioners' New York lawyers did direct his attention to the infirmity of his status because of his failure to secure admission to the District Court and that Spanos nonetheless did not ask for such admission (R. 110a-112a). There is not a scintilla of evidence that Spanos ever requested anyone to move his admission. It is incredible that he was not fully alert to the necessity for admission; just why he chose not to seek it has never been explained.

Spanos' concern that subjecting out-of-state attorneys to state regulation with respect to unauthorized practice of law would threaten "the livelihood and reputation of countless legal experts who are called from outside their home states to advise and aid in the prosecution and defense of complex federal causes of action" (Memo. Opp. 7) may well justify careful consideration by the Congress and

a cooperative effort by the federal and state authorities to accommodate the interests of assuring effective legal counsel on federal matters with the concededly important interests of the states in protecting their citizens from the abuse of unauthorized practice of the law. It was just such careful consideration of similar problems which led to the enactment by Congress of the legislation permitting laymen to practice before the Patent Office. *Sperry* v. *Florida,* 373 U. S. 379, 391-399 (1963). This is a matter, however, for Congressional action; it is no ground for the federal judiciary, before Congress has acted, to disregard state laws and rules relating to the practice of law.

Spanos' fears of "a most dangerous precedent" should petitioners' position be sustained (Memo. Opp. 7) are misplaced; the dangerous precedent arises rather from the decision below. For, as the Memorandum in Opposition shows, a logical extension of that decision inevitably creates a vast body of persons free to render legal services without regulation of any kind whatever. Since, as Spanos recognizes, *pro hac vice* admission would be irrelevant unless a suit were pending in a federal court (Memo. Opp. 8, n.4), he quite correctly reads the decision below to authorize one to perform legal services with respect to federal matters, absent such litigation, without qualifying either under state or federal laws or rules. As the dissenting judges below pointed out, this ". . . would leave the more than 200,000 out-of-state lawyers from the forty nine other states free to practice federal law in New York without any regulation whatever—none from New York, and none from any federal court, until it was time to appear at trial" (Pet. App. 32a). Indeed, the decision below would permit even one claiming legal expertise by virtue of certification only in a foreign country to perform legal services within any of the states so long as the services related to federal questions.

Such a condition would effectively frustrate the well-recognized interests of the states "to protect . . . [their]

citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions'' *Spivak* v. *Sachs*, 16 N. Y. 2d 163, 168, 263 N. Y. S. 2d 953, 956 (1965). The ''general policy of preventing people from getting other people's property for nothing when they purport to be buying it'' (see Memo. Opp. 6) may, as a matter of federal law, justify denying a defendant the right to interpose a defense grounded in a federal statute; it does not, however, justify depriving a defendant of the right to assert a defense made available to him by state law and sanctioned by the state as a means of enforcing vital state policy. See *Kelly* v. *Kosuga*, 358 U. S. 516, 519 (1959).

2. Spanos cavalierly dismisses the second important question presented by the decision below—whether and, if so, to what extent the privileges and immunities clause of the Fourteenth Amendment restrains the states in their regulation of the practice of law—as the subject merely of ''an advisory opinion'' and thus not reviewable by this Court (Memo. Opp. 2, 14).

The opinions of the *in banc* Court, however, make it crystal clear that all the judges below considered the privileges and immunities clause as supplying an independent ground for the decision of affirmance. Although Judge Friendly's opinion, approves the District Court's holding that Spanos' ''right to recover could be predicated on Rule 3(c)'' (Pet. App. 24a) and notes that ''this would suffice to dispose of the case'' (*Id.* 25a), it proceeds to deal with the ''other *grounds* that have been urged for affirmance'' (*Id.* 25a, emphasis supplied). And at the very beginning of the discussion with respect to the privileges and immunities clause, the opinion describes its conclusion in that regard as a holding, stating (*Id.* 26a):

> ''. . . [W]e hold that under the privileges and immunities clause of the Constitution no state can

> prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state."

At the end of that portion of the opinion, it once more describes the discussion as a holding (*Id.* 29a):

> ". . . We thus limit our holding to the situation here presented. . . ."

Judge Hays, concurring in the result, deemed it necessary to write a separate opinion to express disagreement with the limited holding as to the scope of the privileges and immunities clause (Pet. App. 30a).

And the dissenting opinion of Chief Judge Lumbard (with whom Judge Smith concurred) likewise makes clear that the privileges and immunities clause is one of the grounds of the *in banc* Court's decision, stating, as follows (Pet. App. 30a):

> "Judge Friendly's opinion now supports recovery on the theory that no state can prohibit a citizen with a federal claim from engaging an out-of-state lawyer to collaborate with an in-state lawyer because of the privileges and immunities clause of the Constitution. . . ."

In these circumstances, there is no justification whatever for dismissing this portion of the Court's opinion as merely advisory. Certainly, there is nothing abstract or hypothetical about our case, such as there was in *Muskrat* v. *United States,* 219 U. S. 346 (1911), *Alabama* v. *Arizona,* 291 U. S. 286 (1934), and the other cases where this Court has refused to review or render advisory opinions. Here, without question, we have a justiciable case and controversy, an actual dispute between real and adverse litigants.

Moreover, it is, of course, well established that "where a decision rests on two or more grounds, none can be rele-

gated to the category of *obiter dictum*". (*Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 537 (1949)); ". . . where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other' . . ." (*United States* v. *Title Ins. Co.*, 265 U. S. 472, 486 (1924). Accord, *Massachusetts* v. *United States*, 333 U. S. 611, 622-623 (1948).

The decision below with respect to the impact of the privileges and immunities clause on the New York law as to unauthorized practice thus raises a question clearly reviewable by this Court. Review is warranted and reversal is required because the decision represents a wholly unjustified radical extension of the reach of the clause and enlargement of the powers of the federal courts at the expense of the states.

Respectfully submitted,

MILTON C. WEISMAN,
HARRY I. RAND,
Attorneys for Petitioners.

Dated: December 1, 1966.